UNITED STATES GOVERNMENT
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 29

TWR EXPRESS, INC.
Employer

and Case No. 29-RC-9745

LOCAL LODGE 340, DISTRICT 15,
INTERNATIONAL ASSOCIATION OF
MACHINISTS AND AEROSPACE
WORKERS, AFL-CIO
Petitioner

DECISION AND DIRECTION OF ELECTION

Upon a petition duly filed under Section 9(c) of the National Labor Relations Act, herein called the Act, as amended, a hearing was held before Nancy B. Lipin, a Hearing Officer of the National Labor Relations Board, herein called the Board.

Pursuant to the provisions of Section 3(b) of the Act, the Board has delegated its authority in this proceeding to the undersigned.

Upon the entire record in this proceeding, the undersigned finds:

1. The Hearing Officer's rulings made at the hearing are free from prejudicial error and hereby are affirmed.

2. The record indicates that TWR Express, Inc., herein called the Employer, the Company or TWR, a New York corporation, with its principal office and place of business located at 38-30 Crescent Street, Long Island City, New York, herein called its Long Island City facility, has been engaged in providing executive transportation services. During the past year, which period is representative of its annual operations generally, the Employer, in the course and conduct of its business operations, derived

gross annual revenues valued in excess of $500,000 and purchased and received at its Long Island City facility, goods and materials valued in excess of $5,000 directly from entities located within the State of New York, which entities, in turn, purchased said goods directly from entities located outside the State of New York.

Based on the stipulation of the parties, and on the record as a whole, I find that the Employer is engaged in commerce within the meaning of the Act, and that it will effectuate the purposes of the Act to assert jurisdiction herein.

3. The labor organization involved herein claims to represent certain employees of the Employer.

4. A question affecting commerce exists concerning the representation of certain employees of the Employer within the meaning of Section 9(c)(1) and Section 2(6) and (7) of the Act.

5. Local Lodge 340, District 15, International Association of Machinists and Aerospace Workers, AFL-CIO, herein called the Petitioner or the Union, seeks to represent a unit of all full-time and regular part-time drivers, but excluding all office clerical employees, professional and managerial employees, guards and supervisors as defined in the Act.

At the hearing, the Employer took the position that drivers who are signatories to franchise agreements with TWR, herein called franchise owners or franchisees, are independent contractors. Further, the Employer contended that certain drivers who have not entered into franchise agreements are employees of the franchisees, not employees of TWR. The Petitioner took the position that TRW's drivers are employees, without specifically distinguishing between franchisee drivers and non-franchisee drivers. Both

parties agreed that franchisees who do not drive are not encompassed by the petitioned-for bargaining unit.

The sole witness to testify at the hearing was Employer witness Mario Ragonesi ("Ragonesi"), who has been the Employer's Communications Director since 1998 or 1999. Ragonesi was first hired by the Company in 1995 as the Director of Security, a title he held for about two years. He has also served as the Company's Dispatch Room Manager.

FACTS

Overview of Operation

Ragonesi testified that TWR is in the business of providing car service to corporations. The approximately 526 drivers who perform this service supply their own cars and pay their own expenses, pursuant to a standard 13-page Franchise Agreement, drafted by the Employer, which they are all required to sign. The Franchise Agreement declares that, "The Franchisee is and shall remain an independent contractor and shall not be deemed to be an employee or agent of the Company."

The Employer's regular payroll includes employees in the Dispatching, Customer Service, Sales, Billing, Human Resources Billing, and Bookkeeping departments. The Dispatching Department, which has the most contact with the drivers, operates around the clock and employs operators, knock off operators, airport reservationists, dispatchers, and mobile dispatchers. The operators take telephone calls from customers making reservations and enter the information into the computer system. Then, the knock off operators[1] call the customer back to tell him what the car number is and how long it will be before the car arrives. If a passenger is being driven to or from an airport, an airport

reservationist checks on the status of the flight and conveys this information to the dispatchers and mobile dispatchers.

Currently, there are about five dispatchers who work at the main office. Ragonesi defined a dispatcher as "a communicator between the driver and the base," or "between the customer and the driver and the base," with regard to matters such as changes in passengers' pickup time or location, no-show customers, passengers without vouchers, flat tires, car breakdowns and the like. Sometimes a driver calls (or radios) the dispatch room to ask for directions, or to report a problem with a difficult customer. In the latter situation, the dispatcher makes a record of the problem, reminds the driver that a service business necessarily involves dealing with the public, and advises the driver that if necessary, he can request not to pick up that particular passenger in the future.

In addition, there are about 11 mobile dispatchers. They are usually stationed at pick-up points at the airports, and at several corporate clients' facilities during set times. At the pick-up points, there are "working lines" where drivers line up in their cars to await passengers. The mobile dispatchers "organize the line" and help passengers to locate cars. In addition, if there are not enough cars to accommodate the passengers, they notify the dispatchers at the Employer's main office.

Ragonesi stated that his job as Communications Manager includes answering drivers' questions "in relation to traffic tickets or TLC [the Taxi and Limousine Commission], or they didn't get the correct amount of money on their paychecks, or they were short on a voucher or they can't find a voucher or they lost a fare number."

[1] Ragonesi testified that "knock-off-operator" is a function, not a job title.

Drivers' Qualifications

The Employer advertises for drivers/franchisees in the Black Car News. Presently, Ragonesi is in charge of recruitment. TWR's franchisee/drivers must have proper work documentation, must be licensed by the Taxi and Limousine Commission ("TLC"), and must own, lease, or be willing to own or lease a car conforming with the standards set by the Employer. In addition, they must be prepared to pay the various fees set forth in the Employer's standard franchise agreement. In some instances, former franchisees who had "problems with the Company" might be barred from returning.

The Employer tells prospective franchisees who meet their requirements to review TRW's prospectus[2] and to come back in 10 days if they are still interested. The Employer's 2001 prospectus, received into evidence as Employer's Exhibit 1, includes the following attachments: the Employer's standard Franchise Agreement,[3] loan documents, financial statements, the Employer's Operations Manual, the Security Committee Rule Book, a listing of franchises sold in 1998, 1999 and 2000, a list of franchisees[4] and a list of "Franchisees Who Have Not Been in Contact with the Company During the Past 10 Weeks."[5]

If a prospective franchisee is still interested after reviewing the Employer's prospectus, he then signs the Franchise Agreement, which incorporates by reference the 49-page Operations Manual and 18-page Security Committee Rule Book. These three documents compel him to pay substantial fees and other expenses, to accept the

[2]Both the Federal Trade Commission and the New York State Attorney General's office (the New York State Department of Law) require that the Employer's Franchise Offering Prospectus for Prospective Franchisees ("prospectus") be filed annually.
[3] The version contained in Exhibit 1 has been superceded by a more current franchise agreement, received into evidence as Employer's Exhibit 2.
[4] Pages 4 and 5 of this 37-page document were not included in the exhibit.
[5] Page 3 of this 3-page document was not included in the exhibit.

Employer's rate schedule and voucher payment system, to abide by the Employer's extensive rules and regulations and to undergo training.

Expenses Assumed by Franchisees

As stated above, franchise owners provide their own cars, which they either own or lease. They are responsible for securing their own financing. All vehicles must be navy blue or black four-door Lincoln Town Cars or Cadillacs, and must be no more than seven model-years old. In addition, the Franchise Agreement requires franchise owners to "carry at all times personal liability insurance coverage, naming the Company as an additional insured and/or certificate holder, of $100,000 per person and $300,000 in the aggregate per accident, $200,000 personal injury protection, as well as $50,000 in property damage." Ragonesi testified that sometimes the Company makes loans to franchisees of up to $2500, usually for the purpose of buying insurance.

Further, franchise owners assume the costs of vehicle maintenance and repair, gasoline, traffic tickets, summonses, towing costs and inspections. They are also responsible for purchasing clothing conforming to the Employer's dress code requirements. Finally, Ragonesi testified that it is up to the driver or franchisee whether to invest in a mobile car phone, which can be used by passengers. If so, drivers are free to maintain an account with any telephone provider they wish.

Fees Paid by Franchisees

The Agreement sets forth a non-refundable Franchise Fee of $30,000.00.[6] The Franchise Fee includes the use of a two-way radio and a mobile data terminal ("MDT"), supplied by the Company, to communicate with the Company's dispatching office. A further provision states that if the Employer "elects to upgrade and/or change the

Equipment [referring to the two-way radio and mobile data terminal], Franchisee shall be responsible to pay for the cost of such Equipment." The Franchise Fee may be paid in installments, with 15% annual interest. Requests for extensions of time with regard to installment payments are handled by Ragonesi.

Prior to the installation of the two-way radio and MDT, the Agreement requires franchisees to pay the Employer a non-refundable $700 "Administrative and Processing Fee." Ragonesi asserted that this $700 "membership fee" covers the cost of an air filter, a reading light, a credit card swipe machine, an umbrella, maps, vouchers, signs and training costs for new employees. In addition, the Franchise Agreement requires franchisees to pay a security deposit of "$2,500.00 or the actual cost of the equipment, whichever is greater." The Employer, "within its sole discretion, may increase the amount of the security deposit required based upon the replacement and/or fair market value of the Equipment, whichever is higher, and the Franchisee's prior history with the Franchisor and/or within the industry." The security deposit may be applied toward the replacement or repair of the equipment, or toward any moneys owed by the franchisee "under any of the terms of this Agreement." Otherwise, it is returned "without interest" 60 days after the franchise is transferred or terminated.

From the time of purchasing a franchise until the franchise is terminated, sold or transferred, there is also a non-refundable "Weekly Service Fee" of "$40.20 [per week] for a sole proprietor or a single shift use of the franchise and $47.30 [per week] for ownership by other than a sole proprietor or for double shift use of the franchise." Under the terms of the Agreement, this fee, referred to by Ragonesi as a "weekly dues payment," must be "paid whether or not the Franchisee, his agent or authorized driver

[6] The Employer recently announced an increase in the Franchise Fee, from $25,000.00 to $30,000.00.

actually uses the Equipment and services provided by the Franchisor during such time period. Non-use of the Franchise does not suspend a Franchisee's obligation to pay the Weekly Service Fee." In addition, the Franchise Agreement gives the Employer the ability to increase the Weekly Service Fee. However, Ragonesi testified that recently the weekly service fee was lowered by the Employer.

Finally, the Franchise Agreement binds franchisees to pay additional unspecified "operational fees which may from time to time be deemed necessary by the Board of Directors of the Company."

Rates Charged Customers

The Employer and its corporate clients negotiate the rates charged by TWR for trips between different geographical zones. These rates are enumerated in the Company's three "rate books," or "price books," and include discounts negotiated with high-volume customers. The drivers/franchisees have no role in determining the rates charged, but a driver may "opt off" driving passengers from any corporate client receiving a discount. According to Ragonesi, there is no penalty for doing so.

In addition, the Employer's Operations Manual includes pricing rules for stops, for waiting time and for mobile car phone usage. It requires that drivers charge passengers $2 per minute for local telephone calls, $3 per minute for long distance calls and $4 per minute for international calls.

Payment of Drivers

Passengers pay drivers by voucher, credit card or cash. Ragonesi claimed that if a driver is paid in cash, he keeps "100%" of the fare and does not have to pay a commission to TWR. However, the record does not reveal how often this occurs.

When vouchers are used, the voucher forms are supplied by either the driver or the passenger's employer. The driver completes the voucher form, including the charges for the ride itself, any mobile car phone charges, waiting time and any other services provided. The passenger then initials the voucher form. Ultimately, the voucher is processed by TWR's Billing Department, herein called Billing,which computes the total charges on the voucher and sends the customer a bill.

Billing also computes the amount TWR owes the driver, by deducting a number of fees from the total voucher charges (also referred to as the "Gross Voucher Income"). First, Billing deducts the Employer's "Voucher Processing Fee" or "commission." Under the Franchise Agreement, this commission is equal to 15.5%, 17.5% or 20% of the Gross Voucher Income, depending on how quickly the franchisee wants to be paid. For example, if the franchisee is willing to wait three weeks to be paid, the commission deducted from his check by the Company will be 15.5% of the Gross Voucher Income (the lowest possible commission). The Franchise Agreement permits the Employer "to either suspend one of the 3 Voucher Processing Fee percentage options...and/or extend the payment time for each up to four (4) additional weeks upon 3 days notice to the Franchisees." Potentially, this could result in franchisees' having to wait up to seven weeks to be paid.

Next, Billing takes off a "Deductible" of $1.00 for each voucher. If a customer pays by credit card, an "Additional Voucher Fee" is deducted to reimburse the Employer for credit card processing fees. The Franchise Agreement reserves for the Employer "the right to increase the… Deductible and/or Voucher Processing Fee and/or Additional Voucher Processing Fee after thirty (30) days' notice to Franchisee."

Lastly, if the Gross Voucher Income includes any mobile car phone charges, then the telephone sales and use tax is deducted from the amount owed the driver. The reason for this is that the Company (not the driver) bills the customer for the telephone charges, and therefore the Company is required to pay the telephone sales and use tax. Since most of the mobile car phone charges are forwarded to the driver, he then reimburses the Company for this tax.

The Employer's Operations Manual includes a section on voucher drop-off and payment, with detailed instructions for filling out and submitting the vouchers, using the Employer's rate books, and calculating discounts, rebates, taxes, commissions, and deductibles, with the caveat that "all pricing procedures are subject to change."

Non-Franchisee Drivers

Ragonesi testified that a franchise owner can employ a non-franchise owner as a driver, or lease the franchise rights to a non-owner. Some franchise owners both drive for TWR and hire outside drivers. Alternatively, two individuals may enter into a partnership, with each partner owning half the franchise rights and one or both individuals driving. The record does not reflect how many drivers fall into any of these categories.

The Franchise Agreement prohibits the franchisee from allowing any other party to use the two-way radio, the MDT, or any other aspect of the franchise, without the Employer's written consent. Thus, any outside "driver/lessee/agent" who is not a franchisee must be approved in writing. TWR screens non-franchisee drivers to ensure that they have a TLC license, registration, insurance coverage, and proper work documentation and can pay the security deposit. The Operations Manual provides for the

inspection of their vehicles and paperwork. In addition, TWR might reject a driver who had previous problems with the Company, or whose English is poor. However, Ragonesi contended that the Employer has never rejected an outside driver whom a franchisee wished to hire.

All non-franchisee drivers must comply with the rules and regulations in the Franchisee Agreement, Operations Manual and Security Rule Book, as mandated by the Employer's Operations Manual. For each non-franchisee driver, the franchisee (or alternatively, the non-franchisee driver) must pay a "Driver Security Deposit" of $1,000.00, and a non-refundable administrative fee of $500.00. In addition, the franchisee must pay double-shift weekly dues. Ragonesi acknowledged that non-franchisee drivers are paid directly by TWR.

Training

The Franchise Agreement requires both the franchisee and all drivers of his vehicle to attend and pass a 20-hour training class, currently being taught by Ragonesi. He testified that only the most experienced drivers are exempted from this rule. The class encompasses the Employer's Operations Manual and Security Committee Rule Book, computer system, corporate clients and pick-up locations. There is also on-the-road training on how to navigate airports and congested neighborhoods, where to park and the like. After the training, there is a written test which franchise owners and drivers must pass before they can begin driving for the Employer. If they fail the test, they have to undergo more training. Ragonesi clarified that the training takes places after new franchise owners have signed the Franchise Agreement and paid the $30,000.00 Franchise Fee.

Grace Period

For the first 30 days after the training, referred to as the "grace period," new drivers are not given out-of town assignments, which tend to be the most lucrative or those involving important packages. According to Ragonesi, new drivers are not penalized for rules violations during this period. Under the Franchise Agreement, the grace period "may be extended and/or shortened" by the Employer. Ragonesi testified that only the most experienced drivers can ask for a waiver of the grace period.

Outside Entrepreneurial Opportunities

The Employer's standard Franchise Agreement prohibits franchise owners from entering into franchises with other black car dispatch services. Any drivers hired by the franchise owners are also prohibited from driving for other companies. According to Ragonesi, it is "not legal" under TLC rules to drive for more than one company.

According to Ragonesi, this is based on a TLC requirement. However, he stated that franchisees may carry passengers other than those assigned by TWR, or "they can contract themselves out to anybody." For example, if a passenger employed by a TWR client gets a new job with a company that is not a TWR client, a TWR franchisee could enter into an agreement to continue driving that individual. However, Ragonesi was nonresponsive when asked to provide examples of TWR franchisees who have contracted out to carry passengers not employed by TWR clients.

Degree of Autonomy Exercised by Drivers

Ragonesi stated that drivers are not required to work any set number of hours per day, or days per week, nor do they have to start or finish work at a particular time. There is no minimum weekly income. Ragonesi testified that many of the drivers take long

vacations, of up to six months. The only restriction on their working hours, which is set by the Taxi and Limousine Commission, according to Ragonesi, is that they may not drive more than 12 hours per day.

Ragonesi stated that on the days that drivers elect to work, they use their computer terminals to "book into" a geographical "zone of their choice." Before doing so, they can "query into a zone" to see how many other cars are already ahead of them on the list. Other than the Newark and JFK airports, there no limitations on the number of cars booked into a single zone.

After drivers book into zones, the computer "automatically" transmits work assignments (which have been entered into the computer by the Dispatching Department) to drivers within each zone. The computer transmits assignments in the order in which passengers want to be picked up, and distributes the assignments among the drivers in the order in which they booked into the zone. Once a driver is offered an assignment, he has to accept it within a set amount of time, which Ragonesi believed to be "less than a minute." Otherwise, he forfeits the job and his place in line and has to re-book into the zone, at the end of the line. There is also a maximum amount of time in which to get to a job, the failure to comply with which can result in a penalty.

Drivers may also join "working lines"[7] at certain clients' facilities, or at an airport. This entails lining up their vehicles to wait for fares. Passengers approach the "working line" on their own, or with the help of a mobile dispatcher, without first making a reservation. The Operations Manual mandates that "No franchisee/driver should refuse any call from the working lines."

[7] See supra p. 4.

Drivers are permitted to wait for fares on a working line while being booked into a geographical zone at the same time. Normally, a driver may not be booked into more than one zone at a time, but he can "conditionally book into a [second] zone" for the purpose of trying to get a particular job. Also, a driver may book out of one zone and then book into another zone.

If a scheduled passenger is late, the driver telephones the dispatcher every 15 minutes, and the dispatcher determines how long the driver should continue to wait. At the end of that time, if the passenger does not show up, the driver has the option of taking a cancellation, which would put him back at the top of the list of drivers for his zone, but without being paid for his time. Alternatively, the driver can take a "no-show," for which he would be paid $8.00 plus any waiting time, but would be removed from the list of drivers for his zone. He would then have to book back in at the bottom of the list.

Ragonesi claimed that when there are not enough drivers to cover the work available, the Company does not attempt to contact additional drivers at home. In such instances, he asserted, TWR has to turn down work. In addition, Ragonesi maintained that a driver has the option of telling the Employer that he objects to passengers who smoke or have packages, or that he is unable to accommodate passengers who need car phones. If he does so, he will automatically be bypassed by the computer with respect to any job involving such passengers.

Moreover, Ragonesi testified that drivers may reject up to three jobs per day, in which case the computer automatically assigns those jobs to the next driver on the list of drivers booked into that zone. A driver's decision whether to reject a job must be made in the absence of information on the passenger's destination, which is disclosed only after

a driver accepts or rejects a job. If a driver rejects three calls within a zone, all on the same date, the computer automatically suspends him for two hours, taking him "off the air." The Agreement also obligates franchisees to submit to lie detector tests and random substance abuse testing. However, Ragonesi testified that no franchisee has ever been required to take a lie detector test.

Vehicle Requirements and Inspections

Standards regarding vehicle requirements and maintenance are set forth in the Employer's Operations Manual, the Security Committee Rule Book and the Franchise Agreement. For example, all cars must be navy blue or black four-door Lincoln Town Cars or Cadillacs, as stated above. Car body damage must be reported to TWR and repaired within two weeks. Cars must be simonized or waxed at all times, and the front passenger seat must be free of personal belongings. The Operations Manual lists dozens of "required items" which drivers/franchisees must have with them when on duty, including the TWR Operations Manual, the TWR rate book, TWR business cards, a TWR window sign and airport sign, a TWR backplate and a TWR window sticker.

In addition, Ragonesi is in charge of enforcing a rule that vehicles must be no more than seven model-years old. In this regard, he is authorized to grant extensions to franchisees who need more time to find new vehicles, or to secure loans. A franchisee who has bought or leased a new car must show Ragonesi the new registration and insurance forms, and arrange for the two-way radio and a mobile data terminal to be transferred to the new car. For the latter purpose, the franchisee has to use TWR's authorized service station, otherwise TWR will not cover the cost of repairing any future damage to the equipment.

Ragonesi conducts vehicle inspections twice a year pursuant to the Employer's Operations Manual, to ensure that franchisees' vehicles are clean and have no dents, and that drivers' licenses, registration, insurance and other paperwork are up-to-date. If a franchisee does not comply with these requirements by a deadline announced prior to the inspection by Ragonesi, Ragonesi may take the franchisee "off the air" (i.e., suspend him) until he complies with the inspection.

Further, Ragonesi testified that between official inspections, if a customer complains to TWR about the condition of a car, the driver may be asked to come to the Employer's main offices to have the car checked. For example, if a car has a broken air conditioner, Ragonesi may take the driver "off the air" until the air conditioner is fixed. In the event that the driver is near a mobile dispatcher at the time the complaint is made, the mobile dispatcher can confirm whether the air conditioner is broken and require the driver to fix it. While checking the air conditioner, if the mobile dispatcher notices that the car is dirty or dented, he would report this to the base, and the driver would be asked to clean his car or fix the dents. If the driver does not comply, any penalty would be determined by a Security Committee member.[8]

The Employer's Operations Manual

The 49-page "TWR Express, Inc. Operations Manual," dated January 2001, was drafted by TWR and states that "All procedures and guidelines contained in this manual are subject to change by TWR at any time." The "General Guidelines" section includes standards of conduct and attire, and warns that "franchisees/drivers who violate any

[8] See infra p. 17-18.

procedure or guideline, which may lead to a passenger complaint, will not be paid for the fare," and "may be taken off any account if requested by the customer."

Further, the Operations Manual sets forth detailed procedures and rules on accepting assignments, making pick-ups, using the mobile date terminal ("MDT"), maximum estimated times of arrival ("E.T.A.'s") and dispatched lead times at various locations, no-show passengers, waiting time, pickups inside airports, working lines at customers' facilities and other matters affecting the day-to-day performance of the drivers. It includes the procedure to follow if no driver has booked into a particular zone, and an emergency dispatch procedure in the event of a computer failure. There is a procedure for turning in "lost and found" items.

Security Committee and Security Committee Rule Book

Ragonesi testified that the Security Committee is comprised of ten franchisees.[9] All were either appointed by the Chairman of the Security Committee, or elected by the entire complement of franchise owners.[10] The Security Committee shares Ragonesi's office with him. Ragonesi stated that its function is to engage in self-monitoring by promulgating rules, enforcing the rules and setting penalties for rules violations. These

[9] Current Security Committee members (in the order that their names appear in the transcript) include Diobag Singh, chairman, Kuljeet Singh, co-chairman, Ronald Santini, Aaron Saroka, Harjit Singh (Car #217), "Winjing" (Car #77), Jagtar Singh (Car #348), Sukhminder Singh (Car #360), Jaswant Singh, and Kamaaljit Singh (Car #43). With regard to the identity of the latter 6 Security Committee members, the witness's memory was refreshed with a printed list of franchisee drivers, contained in attachment "I" of Employer's Exhibit 1. Attachment I does not have a page 4 or 5 between pages 3 (ending with Driver #65) and 6 (beginning with Driver # 109). Thus, in reading the transcript of the hearing, there was no way to verify the spelling of "Winjing," the purported driver of Car 77.

[10] As noted in Petitioner's brief, there are apparently no written rules governing the frequency of Security Committee elections, or the manner in which they are conducted. In early 2000, franchisees seeking a new election submitted a petition to the management of TWR. In a response dated March 17, 2000, Ragonesi disparaged the "so-called leaders of the petition" and requested that all petition-signers see him in the office to verify their signatures. As of 1995, the TWR Express Rule Book provided that Security Committee members would be appointed by the Director of Security, who was Ragonesi at that time. Ragonesi denied that this had occurred.

rules and penalties are in the Security Committee Rule Book. When complaints regarding alleged rules violations are filed against drivers, the Security Committee either conducts arbitration hearings or metes out penalties without a hearing, depending on the type of violation. Arbitration hearings are held by three-member panels of arbitrators, who are chosen from among the franchisees by the Security Committee. Complaints against drivers may originate with corporate clients, passengers, dispatchers, mobile dispatchers, Security Committee members or other franchisees and/or drivers.

Suspensions imposed by the Security Committee are entered into the computer system either by Ragonesi or a dispatcher. Monetary penalties are processed by the Employer's Bookkeeping Department. The Franchise Agreement "authorizes the Company to deduct from the Franchisee's voucher earnings the amount of any fine, penalty assessed by the Franchisee Committee(s) against the Franchisee…The Company will turn over said sums deducted to the Franchisees' Committee and/or a designated bank account." Ragonesi testified that all monetary penalties go into the Security Committee checking account. This checking account is used to pay Security Committee members either "$20 or $25" per hour for the time they attend hearings, and to cover their weekly dues payments to the Company (a sum of more than $2,000 per year). When there is insufficient money in the Security Committee checking account to cover its members' weekly dues and hourly payments, according to Ragonesi, the Employer "would pick up the difference with the money to be reimbursed at a later time." Ragonesi acknowledged that the Security Committee bank account is balanced and maintained by TWR's Bookkeeping Department employees. However, he denied knowing who is authorized to make deposits or withdrawals from the account, who has physical custody

of the checkbook, whose name appears on the checks, and whether the account was opened in the name of the Security Committee.

The 18-page Security Committee Rule Book includes a list of security violations, many of which either duplicate or elaborate on the rules set forth in the Employer's Operations Manual. Beneath each violation are the monetary penalty and length of suspension for the first and second offenses. In addition, the Rule Book contains a separate list of automatic suspensions and/or fines imposed without a hearing, for offenses such as dress code and car code violations. Detailed standards for complying with the dress code and car code are included under "General Rules." There is also a section setting forth rules on "combat points" awarded for working in specified zones during set hours when drivers are in high demand. However, Ragonesi testified that this point system is no longer in effect.

For the sake of comparison, Petitioner offered into evidence the 51-page 1995 "TWR Express Rule Book," which was apparently drafted by the Employer.[11] It combines into one document chapters which were later incorporated into the Employer's 2001 Operations Manual, and chapters which were later incorporated into the 2001 Security Committee Rule Book. As the Petitioner points out in its brief, most of the current Security Committee Rule Book repeats, almost verbatim, portions of the 1995 TWR Express Rule Book, drafted by the Employer. The only significant substantive change is that the penalties for many of the violations have become more stringent than they were in 1995, while the penalties for a few violations have become less stringent.

[11] For example, the 1995 Rule Book's first section, headed "Welcome to TWR Express, Inc., states, "Our office staff, dispatchers and Security members are always available to assist you…we hope our members and drivers accept these regulations in a manner meant not only to provide excellent service to our customers but also, to enhance and expand the reputation of TWR Express, Inc."

Petitioner also calls attention to a section of the 1995 TWR Express Rule Book which described the Director of Security's duties and responsibilities. According to the 1995 Rule Book, these included appointing Security Committee members, assisting in making or changing the rules, overseeing and following through on all arbitration and security decisions, overseeing and scheduling all arbitration hearings, selecting the arbitrators, acting as the judge at arbitration hearings and supervising the work of the Security Committee. Ragonesi conceded that when he was the Security Director, starting in 1995, he attended a number of Security Committee meetings and arbitration hearings. However, he claimed that this was only as an "observer" who occasionally expressed his "personal opinions." He denied exercising the full authority granted him by the 1995 Rule Book.

Memoranda by Ragonesi

Petitioner also offered into evidence a number of 2000 and 2001 memoranda from Ragonesi to "all franchisees/drivers." Among the matters addressed by these memoranda were changes in conditional booking rules; changes in rules regarding "combat points"; a change in the number of fares drivers could reject each day; penalties for rejecting fares from the major airports; limitations on drivers' telephone calls; the requirement that drivers inspect their vehicles for items left behind by passengers; drivers' personal hygiene; the Employer's dress code and car code; the requirement that drivers display their courtesy signs; and the prohibition against having unauthorized persons in vehicles. Most of these memoranda ended with the words, "Any questions or comments please see the undersigned."

Lack of Benefits

Ragonesi testified that the Employer does not provide any fringe benefits, such as paid vacations, health insurance or a pension plan, to franchisees or their drivers, nor does it withhold Social Security taxes from their checks. At the end of the year, their earnings are reported on Internal Revenue Service ("IRS") 1099 forms, indicating that the drivers and franchisees are self-employed. According to Ragonesi, they are not eligible for unemployment insurance benefits, nor does the Company pay disability benefits on their behalf.

He testified that TWR has a workers' compensation insurance policy covering its employees, which does not cover franchisees or any drivers they may employ. Rather, customers pay a 2% surcharge on every ride, which TWR transmits to a general fund that insures the drivers. Accordingly, the Operations Manual states that "All franchisees are independent contractors and are therefore, not covered by TWR's Workman's Compensation Insurance policy, but are covered by the New York Black Car Operator's Injury Compensation Fund, Inc." However, Ragonesi acknowledged that TWR has been required to pay Workman's Compensation in a number of automobile accident cases. Ragonesi did not know whether any of these cases had been appealed, but he conceded that "there are some that are complete and some that are active." At the outset of the hearing, he testified that his job as TWR's Communications Manger includes going to "compensation court."

Sale/Transfer of Franchise

A franchisee seeking to sell or assign his franchise must first obtain the written consent of the Company, and pay the Company a "transfer fee" equal to 15% of the

Company's standard franchise fee (currently, 15% of $30,000.00, or $4,500).[12] The new buyer of the franchise has to sign the Franchise Agreement and present his TLC license, registration and other documentation. The seller of the franchise must not "disclose Franchisor's trade secrets, trade lists, plans…or customer list, or solicit or do any business with the customers or employees" of TWR for one year after the transfer or termination of the Franchise Agreement.

Ragonesi testified that starting in the 1980s, and continuing to date, a "baby radio" program has been in effect at the Company. This involves giving franchisees a second, no-cost franchise (or "radio"). They then sell it to a new franchisee who meets the Company's qualifications, and pay the Company the transfer fee (currently $4,500). Similarly, in 1999, the Employer gave franchisees[13] the option of buying additional franchises for $1,000.00, conditioned upon their selling these "option franchises" or "option radios" to new franchisees whose credentials were acceptable to the Company. There was no transfer fee. This "option radio" program was discontinued. Both of these programs had as their purpose the recruitment of additional franchisees and drivers, because of a shortage of drivers. According to Ragonesi, there are currently about 526 franchises, including baby radios, option radios and regular franchises.

Termination of Franchise for Cause

Ragonesi testified that the Board of Directors makes the final decision whether to

[12] The Franchise Agreement indicates that if the sale price of the franchise is higher than the Employer's standard franchise cost (i.e. $30,000.00), then the transfer fee is 15% of the sale price. Ragonesi indicated that this rarely occurs.

[13] Only franchisees with minimum annual earnings over $15,000 had the opportunity to participate in the "option radio" program.

terminate a franchise for cause. He knew of a number of drivers whose franchises had been foreclosed or terminated when their owners stopped making weekly dues or other payments required by the Franchise Agreement. The Company then resold the franchises.

The Franchise Agreement provides that the Employer may terminate the Agreement "for cause" if the franchisee breaches any one of 22 itemized "material terms or conditions," or "any other term or condition" of the Franchise Agreement. The 22 listed items include permitting a party other than the franchisee to operate the franchise; attempting to assign the agreement without prior written authorization; failing "to maintain Franchisee's vehicle in excellent condition and offer professional courteous and efficient service"; failing to comply with the restrictive covenants of the Agreement (such as the prohibition against disclosing confidential information concerning the Employer's operations and customers); and the use or "suspected" use of drugs or alcohol.

If a franchise is not sold, transferred, or terminated for cause, it can be renewed after five years if both parties agree, for a fee of $20.

Discussion

Section 2(3) of the Act provides that the term "employee" shall not include, *inter alia*, "any individual having the status of independent contractor." The burden of proof in establishing that status is on the party asserting that an individual is an independent contractor, without statutory protection. *BKN Inc*., 333 NLRB No.14 (2001). I find that TWR has failed to carry this burden.

In determining whether individuals are independent contractors or employees within the meaning of Section 2(3) of the Act, the Board applies the common law agency

test. *BKN Inc*., 333 NLRB No.14 at 2. Among the factors considered significant in determining whether an employment relationship exists are: "(1) whether individuals perform functions that are an essential part of the Company's normal operation or operate an independent business; (2) whether they have a permanent working arrangement with the Company which will ordinarily continue as long as performance is satisfactory; (3) whether they do business in the Company's name with assistance and guidance from the Company's personnel and ordinarily sell only the Company's products; (4) whether the agreement which contains the terms and conditions under which they operate is promulgated and changed unilaterally by the Company; (5) whether they account to the Company for the funds they collect under a regular reporting procedure prescribed by the Company; (6) whether particular skills are required for the operations subject to the contract; (7) whether they have a proprietary interest in the work in which they are engaged; and (8) whether they have the opportunity to make decisions which involve risks taken by the independent businessman which may result in profit or loss." *Standard Oil Company,* 230 NLRB 967, 968 (1977). This list of factors overlaps with that set forth in the Restatement (Second) of Agency (defining employer-employee, or "master-servant" relationships, as distinguished from those with independent contractors), which begins with "(a) The extent of control which, by the agreement, the master may exercise over the details of the work," and also includes "(e) Whether the employer or the workman supplies the instrumentalities, tools, and the place of work for the person doing the work." Restatement (Second) of Agency, Section 220 (quoted in *Roadway Package System, Inc*., 326 NLRB at 849 n. 32).

In applying the common law agency test, some past Board cases have placed particular emphasis on "the extent of control over the details of the work," or the "right to control the manner and means of accomplishing the end result." *See Elite Limousine Plus***,** 324 NLRB 992 (1997); *Yellow Cab Co.,* 312 NLRB 142, 144 (1993); *Metro Cars*, 309 NLRB at 516. In taxi and limousine cases, an important consideration in evaluating the extent of control is whether there is "any relationship between the company's compensation and the amount of fares collected," which would tend to give the company a financial incentive to exert control over the "manner and means" of drivers' performance. *See Air Transit***,** 271 NLRB 1108, 1110 (1984)(fixed rental fee bore no relationship to daily earnings); *see Elite Limousine,* 324 NLRB at 1002 (employer's "voucher processing fee" of 17-20% of drivers' fares gave it a direct financial stake in those fares); *Metro Cars*, 309 NLRB at 516 (employer's commission gave it a direct financial stake in drivers' fares); *Yellow Cab Co.,* 312 NLRB at 144 (rental fee and customers' fares were related, in that both were based on mileage).

However, in *Roadway Package System, Inc*., 326 NLRB 842 (1998), cited in TWR's brief,[14] the Board held that "the common-law agency test encompasses a careful examination of all factors and not just those that involve a right of control." *Roadway*, 326 NLRB at 850. Further, the Board elaborated, "Not only is no one factor decisive, but the same set of factors that was decisive in one case may be unpersuasive when balanced against a different set of opposing factors. And though the same factor may be present in different cases, it may be entitled to unequal weight in each because the factual background leads to an analysis that makes that factor more meaningful in one case than

[14] Brief of Employer at 13.

in the other.'" *Roadway*, 326 NLRB at 850 (quoting *Austin Tupler Trucking*, 261 NLRB 183, 184 (1982)).

Roadway involved drivers who picked up and delivered packages. The drivers received no benefits, and were treated as independent contractors for tax purposes. *Roadway*, 326 NLRB at 854. There was no "discipline system, admonishment of drivers, a grievance procedure, or termination of drivers without cause." *Roadway*, 326 NLRB at 854. Nonetheless, the Board found the drivers to be employees, applying the common law agency test. In so finding, the Board noted that, "The drivers here do not operate independent businesses, but perform functions that are an essential part of one company's normal operations; they need not have any prior training or experience, but receive training from the company; they do business in the company's name with assistance and guidance from it; they do not ordinarily engage in outside business; they constitute an integral part of the company's business under its substantial control; they have no substantial proprietary interest beyond their investment in their trucks; and they have no significant entrepreneurial opportunity for gain or loss." *Roadway*, 326 NLRB at 843, 851. The employer provided the "source for equipment required by the agreement, albeit using third parties, under a system which it created and controls." *Roadway*, 326 NLRB at 853. The drivers did business in the name of Roadway, wearing an "RPS-approved uniform" with an RPS emblem, in vehicles with "Roadway's name, logo, and colors." *Roadway*, 326 NLRB at 851.

Moreover, the drivers' relationship with Roadway created obstacles to the pursuit of outside business activity. *Roadway*, 326 NLRB at 851. For example, all drivers were required to sign identical contracts with Roadway, 326 NLRB at 843, which prohibited

them from conducting outside business for other companies throughout the day. *Roadway*, 326 NLRB at 851. A driver attempting to conduct an outside business would have had to "mask any marking reflecting Roadway's name or business." *Roadway Package System, Inc*., 326 NLRB at 851. Although Roadway contended that some drivers had secured new customers, there was "no evidence that such additional customers have significantly affected the earnings of any driver." *Roadway Package System, Inc*., 326 NLRB at 853. The drivers' ability to sell all or part of their service was offset by Roadway's "considerable control over whether the driver may sell at all, to whom, and under what circumstances," and there was no evidence that drivers realized any gain or profit from these sales. *Roadway*, 326 NLRB at 853. Moreover, "indicators of entrepreneurship, such as performing outside work, business incorporation, use of additional drivers or helpers, or incentive-based income," were absent. *Roadway,* 326 NLRB at 853. *Roadway*, 326 NLRB at 853. The Board found that Roadway had "simply shifted certain capital costs to the drivers without providing them with the independence to engage in entrepreneurial opportunities." *Roadway*, 326 NLRB at 851.

The Employer's brief cites *Dial-A-Mattress Operating Corporation*, 326 NLRB 884 (1998), which held that the "owner-operators" who delivered the employer's mattresses were independent contractors. However, *Dial-A-Mattress ("Dial")* is factually distinguishable from the instant case. There, the owner-operators had formed their own trucking companies, and many had state business certificates or had incorporated. *Dial*, 326 NLRB at 891. They had business checking accounts and tax identification numbers, and often had their own company work uniforms. *Id*. In addition, the owner-operators were permitted to use their vehicles for other purposes, and two

owner-operators had used their vehicles to make deliveries for other companies. *Id.* Several had successfully negotiated reduced delivery rates in return for routes in desirable geographical areas. *Dial*, 326 NLRB at 892.

Moreover, in contrast with TWR, Dial had "no requirement as to the type, model, color, size, or condition of the owner-operators' vehicles," and did not conduct inspections of the vehicles. *Dial*, 326 NLRB at 891. Each vehicle was required to display the name, address and Department of Transportation ("DOT") number of the owner-operator's company, although most also displayed Dial advertising in return for an annual fee. *Id.* The owner-operators arranged their own training, hired their own employees, and had sole control over and complete responsibility for their employees, including setting their terms and conditions of employment. *Id*. All owner-operators employed at least one driver or helper, selected without any input from Dial. *Dial-A-Mattress*, 326 NLRB at 892.

Finally, the Employer, in its brief, relies on factual similarities between *Tel-A-Car of New York*, *Inc*., Case No. 29-RC-9076 (2000), and the instant case:

> As noted in the *Tel-A-Car* Decision, the following factors support a finding of independent contractor status: the drivers supply their own vehicles; the drivers pay some of their own expenses; the drivers treat themselves and are treated by the company as independent contractors for tax purposes; the drivers receive no benefits from the company; the drivers do not work a set daily schedule; the drivers are free to work when and in which open dispatching zone they select; the drivers sign a "Franchise Agreement" which provides that they are independent contractors; the drivers must purchase a franchise from the company or from a franchisee (or in the case of non-owner drivers, must work for a franchise owner); the franchise owner can sell their franchise to a third party; and discipline is meted out by a committee of franchise owners.[15]

[15] Brief of Employer at 13 (citing *Tel-A-Car of New York*, *Inc*., Case No. 29-RC-9076 (2000)).

However, notwithstanding the factors cited in the Employer's brief, the *Tel-A-Car* drivers were found to be statutory employees. The evidence relied on in concluding that the *Tel-A-Car* drivers are employees is similar to the evidence adduced in the instant case. For example, *Tel-A-Car* drivers had to pay "voucher payment fees," demonstrating the employer's "substantial and direct financial stake in the amount of fares collected." To sell a franchise, a franchisee had to obtain *Tel-A-Car*'s permission, pay a transfer payment and comply with restrictive covenants. . The *Tel-A-Car* agreement permitted the employer to unilaterally change drivers' weekly dues, and voucher payment fees. Hiring non-franchisee drivers triggered the payment of security deposits and other fees.

In the instant case, the TWR drivers, like those in *Roadway,* meet the common law agency definition of employees. As drivers for a car service provider, they perform functions that are an essential part of the company's normal operations. They have a permanent working relationship with the Company which normally ends only if they sell their franchises or breach the Franchise Agreement. They account to the Company for the funds they collect under a detailed reporting procedure prescribed by the Company. Other than meeting the requirements for a TLC license, they do not need prior training or experience, and they receive training from the company.

Further, the Franchise Agreement and Operations Manual are promulgated and changed unilaterally by the Company. The Franchise Agreement provides that "all pricing procedures…[are]…subject to change," and the Employer's Operations Manual warns that "All procedures and guidelines contained in this manual are subject to change by TWR at any time." Likewise, the Franchise Agreement specifically permits TWR to unilaterally change the Franchise Fee, the security deposit, the Weekly Service Fee, the

Deductible, the Voucher Processing Fee, the Additional Voucher Processing Fee, "to either suspend one of the 3 Voucher Processing Fee percentage options…and/or extend the payment time for each up to four (4) additional weeks," and to institute new, unspecified "operational fees."

The Voucher Processing Fee and Deductible withheld from every voucher also reflect the Employer's direct financial stake in, and incentive to control, the drivers' performance. The record amply demonstrates the degree of control exercised by TWR over every aspect of a driver's career and day-to-day routine. The Employer screens the drivers, requires that they attend and pass its training program, and limits their assignments during a 30-day grace period. It dictates the clothes drivers must wear, the type of cars they must have and the amount of insurance coverage they must carry. The age, color and condition of cars is rigidly controlled. Twice a year, the Employer inspects the hundreds of cars used in its business, and suspends franchisees who fail to comply with the inspections. In addition, the Employer's Operations Manual includes detailed rules on obtaining, accepting, and carrying out assignments. There are limits on the amount of time allowed for accepting jobs, and for arriving at the pickup point. In the case of a no-show passenger, the dispatcher determines how much time the driver must wait. Drivers are prohibited from refusing fares on working lines, and they are suspended if they refuse more than two dispatched jobs within a 24-hour period. In this regard, drivers' decision-making is hampered by the Employer's refusal to divulge the destination until after the driver accepts or rejects the job.

With regard to the opportunity (or lack thereof) to make entrepreneurial decisions, there is no evidence that TWR's drivers, like those of Dial-a-Mattress, have formed their

own companies, with business checking accounts, tax identification numbers, company work uniforms and other indicia of entrepreneurship. Rather, TWR drivers do business in the Company's name, and are required to use TWR business cards and display TWR signs. Ordinarily, they drive only for TWR, servicing TWR clients and adhering to TWR's rate schedule, discount schedule, mobile car phone rates, and pricing rules for extra stops, waiting time and the like. A contract clause prohibits them from driving for other companies, and there is no evidence that any driver has ever driven non-TWR customers. Unless they obtain TWR's approval and pay substantial fees, the drivers are unable to sell or transfer their franchises, lease their franchises to other drivers, or "hire" non-franchisee drivers (who are paid by the Employer and subject to its control). Moreover, franchisees who sell or transfer their franchises are subject to restrictive covenants. Despite these obstacles, a number of drivers have sold their franchises, but there is no evidence that they realized any gain or profit from these sales. In sum and substance, it appears that TWR, like Roadway Package System, has "simply shifted certain capital costs to the drivers without providing them with the independence to engage in entrepreneurial opportunities." *Roadway*, 326 NLRB at 851.

Based on the foregoing discussion, I find that the franchisees who drive for the Employer (or the drivers who own franchises) are employees under Section 2(3) of the Act. Although there are some factors which tend to support the Employer's theory that they are independent contractors, they are outweighed by the evidence that they are employees.

The parties agreed that franchisees who do not drive for the Employer are not members of the bargaining unit sought. The remaining categories of individuals are (1)

the non-franchisee drivers who are "employed" by franchisees, (2) the franchisees who drive for the Employer, while at the same time "employing" non-franchisee drivers, and (3) members of the Security Committee.

In *Elite Limousine Plus***,** 324 NLRB 992 (1997), the Board found that non-franchisee drivers hired by the franchise owners were employees of Elite. *Elite*, 324 NLRB at 1004. They had to be approved by Elite before they were hired and paid the same weekly service fees as the franchisee drivers, received their assignments in the same manner, used the employer's vouchers, were paid in the same manner and were free to attend training classes with other drivers. *Elite*, 324 NLRB at 1004. Further, the Board found that all drivers shared a community of interest. *Elite*, 324 NLRB at 1004. They all employed the same skills while performing the same work, and their general working conditions were similar, in that they were subject to the same rules and regulations, they received assignments in the same manner and their pay was similar. *Elite*, 324 NLRB at 1004.

Similar considerations apply to TWR's non-franchisee drivers. The Employer screens their applications, using the same criteria it uses in screening franchisees. The training requirement and 30-day grace period apply equally to the franchisee-drivers and non-franchisee drivers. Moreover, the non-franchisee drivers are subject to all the rules and regulations set forth in the Franchise Agreement, Operations Manual and Security Committee Rule Book. As in *Elite*, all drivers receive their assignments in the same manner, use the employer's vouchers and are paid in the same manner. Accordingly, I find that the non-franchisee drivers are employees of TWR. In addition, for the reasons

set forth in *Elite*, I find that that TWR's franchisee and non-franchisee drivers share a community of interest and should be included in the same bargaining unit.

Finally, with regard to the franchisee-drivers (if any) who "hire" non-franchisee drivers, and the ten members of the Employer's Security Committee, I find them to be are Section 2(11) supervisors. Section 2(11) of the Act provides:

> The term "supervisor" means any individual having authority, in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or responsibly to direct them, or to adjust their grievances, or effectively to recommend such action, if in connection with the foregoing the exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment.

Thus, the statutory definition set forth in Section 2(11) sets forth a three-part test for determining supervisory status. Employees are statutory supervisors if (1) they hold the authority to engage in any of the enumerated supervisory functions, (2) their "'exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment,'" and (3) their authority is held "'in the interest of the employer.'" *Kentucky River*, 121 S.Ct. at 1867.

The franchisee-drivers who "hire"[16] non-franchisee drivers engage in at least one supervisory function, that of "effectively recommending" the hiring of employees. The "effectiveness" of these recommendations is evidenced by the fact that the Employer has never rejected any hiring recommendation made by a franchisee, according to Ragonesi. Furthermore, such recommendations are made "in the interest" of the Employer, whose revenue depends on having a sufficient number of drivers servicing its accounts and paying Voucher Processing Fees and Deductibles. With respect to the "independent

judgment" prong of Section 2(11), the Operations Manual warns that, "All franchisees will be responsible for their new driver(s), and will be "held accountable for their driver's actions in relation to TWR and his/her passengers." In addition, the driver-franchisees have to pay an extra $1,000 security deposit, a $500 administrative fee and double-shift weekly dues for any non-franchisee driver they hire. Since the franchisee-drivers have a financial stake in the performance of the non-franchisee drivers they bring into the Company, their recommendations regarding their hire necessarily involve making an "independent judgment" as to their ability to adhere to the Employer's extensive rules and regulations. Accordingly, I find that the franchisee-drivers (if any) who "hire" non-franchisee drivers are Section 2(11) supervisors.

As for the ten Security Committee members, the record establishes that they discipline and suspend other employees when they impose penalties on them. Moreover, they exercise "independent judgment" when they conduct arbitration hearings, evaluate the testimony of witnesses, and make complex factual and legal determinations as to whether employees have committed security violations such as "jeopardizing TWR business," "sexual abuse, verbal abuse or discrimination," and "inflammatory or derogatory comments," and determine whether drivers have committed such violations. The record further demonstrates that Security Committee members exercise their authority in the interest of the employer. The rules they enforce had their origins in the earlier TWR Express Rule Book, drafted by the Employer. Many of the provisions in the current Security Committee Rule Book either duplicate or expand upon provisions in the Employer's Operations Manual. Although the Security Committee is responsible for

[16] Ragonesi, the sole witness to testify at the hearing, was not in a position to provide details regarding the relationship between the franchisee-drivers and the non-franchisee drivers they hire.

enforcing and making changes to the Security Committee Rule Book, all of the memoranda submitted into evidence regarding rule changes, and the importance of adherence to the rules, were from Ragonesi to the drivers and franchisees. He testified that he drafted these memoranda at the Security Committee's request. The integration of the Security Committee's functions with those of management is further illustrated by the fact that Ragonesi shares his office with the Security Committee, and attended Security Committee meetings and arbitrations when he was the Employer's Security Director. In 2000, Ragonesi also authored a memorandum in which he took up the defense of the Security Committee, by proposing to question all those who had petitioned for a new Security Election, and by disparaging employees who spearheaded the petition drive. Finally, the Employer compensates Security Committee members for their work on the committee, out of the monetary fines paid by employees, supplemented by direct payments by the Employer.

Accordingly, I find that the ten Security Committee members[17] are supervisors as defined in Section 2(11) of the Act, and are ineligible to vote in the election directed below. I further find that the following employees constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(a)(1) of the Act:

> All full-time and regular part-time drivers employed by the Employer in the New York metropolitan area, excluding all office clerical employees, professional and managerial employees, guards and supervisors as defined in the Act.

DIRECTION OF ELECTION

An election by secret ballot shall be conducted by the undersigned among the employees in the unit found appropriate at the time and place set forth in the notice of election to be issued subsequently subject to the Board's Rules and Regulations. Eligible

[17] See *supra* at 17 n. 9.

to vote are employees in the unit who were employed during the payroll period ending immediately preceding the date of this Decision, including employees who did not work during that period because they were ill, on vacation or temporarily laid off. Also eligible are employees engaged in an economic strike that commenced less than 12 months before the election date and who retained their status as such during the eligibility period and their replacements. Those in the military services of the United States who are employed in the unit may vote if they appear in person or at the polls. Ineligible to vote are employees who have quit or been discharged for cause since the designated payroll period, employees engaged in a strike who have been discharged for cause since the commencement thereof and who have not been rehired or reinstated before the election date, and employees engaged in an economic strike which commenced more than 12 months before the election date and who have been permanently replaced. Those eligible shall vote whether they desire to be represented for collective bargaining purposes by Local Lodge 340, District 15, International Association of Machinists and Aerospace Workers, AFL-CIO.

LIST OF VOTERS

In order to assure that all eligible voters may have the opportunity to be informed of the issues in the exercise of the statutory right to vote, all parties to the election should have access to a list of voters and their addresses that may be used to communicate with them. *Excelsior Underwear, Inc.,* 156 NLRB 1236 (1966); *N.L.R.B. v. Wyman-Gordon Company*, 394 U.S. 759 (1969). Accordingly, it is hereby directed that within 7 days of the date of this Decision, four (4) copies of the election eligibility list, containing the full names and addresses of all the eligible voters, shall be filed by the Employer with the undersigned who shall make the list available to all parties to the election. *North Macon Health Care Facility*, 315 NLRB 359 (1994). In order to be timely filed, such list must be received in the Regional Office, One MetroTech Center North-10th Floor (Corner of Jay Street and Myrtle Avenue), Brooklyn, New York 11201 on or before November 15,

2001. No extension of time to file the list may be granted, nor shall the filing of a request for review operate to stay the filing of such list except in extraordinary circumstances. Failure to comply with this requirement shall be grounds for setting aside the election whenever proper objections are filed.

NOTICES OF ELECTION

Please be advised that the Board has adopted a rule requiring that election notices be posted by the Employer at least three working days prior to an election. If the Employer has not received the notice of election at least five working days prior to the election date, please contact the Board Agent assigned to the case or the election clerk.

A party shall be estopped from objecting to the non-posting of notices if it is responsible for the non-posting. An Employer shall be deemed to have received copies of the election notices unless it notifies the Regional Office at least five working days prior to the commencement of the election that it has not received the notices. *Club Demonstration Services*, 317 NLRB 349 (1995). Failure of the Employer to comply with these posting rules shall be grounds for setting aside the election whenever proper objections are filed.

RIGHT TO REQUEST REVIEW

Under the provisions of Section 102.67 of the Board's Rules and Regulations, a request for review of this Decision may be filed with the National Labor Relations Board, addressed to the Executive Secretary, 1099 14th Street, N.W., Washington, D.C. 20570. This request must be received by November 23, 2001.

Dated at Brooklyn, New York, November 8, 2001.

/s/ Alvin Blyer
Alvin Blyer
Regional Director, Region 29
National Labor Relations Board
One MetroTech Center North, 10th Floor
Brooklyn, New York 11201

401-2575-4250
401-2575-5650
177-2484-5000
177-2484-8500